In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 396

CLIFTON H. MEISINGER AND OPHELIA MEISINGER,
PETITIONERS

v.

WILLIAM SCULLY AND JANE A. SCULLY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves the distribution of an award in a condemnation proceeding between the owner of a farm and his tenant. The owner, William Scully, had extensive land holdings in the area which were leased on an annual basis to numerous tenants. The tenants owned all improvements, including houses, barns, fences, etc. Customarily the leases were renewed year after year, even though the tenants had no legal right of renewal. There was testimony at the trial that, because of this custom of renewal, the so-called "Scully leases" had a market value greater than the value of the one-year

term and the improvements owned by the tenants. On the basis of this testimony and instructions from the district court, the commission appointed under Rule 71A, F.R. Civ. P., found that the value of the entire estate taken was $56,572, of which the tenant was entitled to $15,244. The tenant's award was composed of $7,372 for damages to the improvements and $7,872 for damages to the leasehold over and above the value of the improvements. This award was accepted by the district court.

The landowner appealed to the Tenth Circuit on the complaint that the $7,872 damages to the leasehold were based on an interest greater than merely the one-year term of the lease. The court of appeals agreed and reversed, holding that the custom of renewing Scully leases over an extended number of years could not create a legal interest in the lessee beyond the one-year term in the face of the explicit language in the lease to the contrary. The court of appeals also rejected, on the authority of *United States* v. *Petty Motor Co.*, 327 U.S. 372, the alternative contention that, even viewed as a one-year lease, "the Government's obligation in fixing a just compensation is measured in terms of market value; the renewal expectancy is reflected in the fair market value and therefore must be recoverable" (Pet. 27).

Since neither party questioned the overall award of $56,572, the government, on appeal to the Tenth Circuit, appeared solely to request that the total award

be approved and to indicate that it had no interest in the question of distribution between landlord and tenant. See *United States* v. *Dunnington,* 146 U.S. 338, 353. On this petition for a writ of certiorari by the tenant, the government continues to have no interest in the matter insofar as it is purely a question of distribution. However, petitioners' apparent contention (*e.g.,* Point III, p. 13), that the Fifth Amendment requires an increased award to them, might well result in increased payments by the United States if the lessor is at the same time held to be entitled to its full interest in the property, *i.e.,* fee title less a short-term outstanding lease.

Specifically, we believe the Tenth Circuit has correctly applied the rule of *United States* v. *Petty Motor Co.,* 327 U.S. 372, 380, n.9, to the effect that "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights." Accordingly, we disagree with the second reason petitioners give for granting the writ of certiorari, *viz.,* that the opinion below is in conflict with this Court's holding in *Petty Motor Co.* In our view, the Tenth Circuit's opinion correctly reiterates the existing rule that "'the 'measure of damage is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term * * * [and] the agreed rent which the tenant would pay for such use and occupancy.' 327 U.S. at 381." (Pet. 27–28.)

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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AUGUST 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969